91-1875 (1)

Supreme Court, U.S.
FILED
MAY 13 1992
OFFICE OF THE CLERK

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

Sebastian C. Sisti,

Petitioner

versus

Merrill Lynch, Pierce, Fenner & Smith, Inc.,

Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITION FOR WRIT OF CERTIORARI

Sebastian C. Sisti 1687 Capeway Road
Powhatan, VA 23139 Tel: 804-598-4446

34pp

Questions Presented

1. In judicial review of arbitral awards, the U.S. Court of Appeals for the Fourth Circuit does not recognize the doctrine which makes manifest disregard of the law by arbitrators grounds for vacating an award. Based on the cases cited herein, however, the Second, Third, Eighth and Ninth Circuits do. Since there is divergence among the Circuits on this issue, would the Court exercise its power of supervision to resolve the conflict ?

2. This Court's ruling in *Rodriquez* suggests that the reversal of *Wilko v. Swan* was a reversal *in toti*. If true, is the doctrine of "manifest disregard", first formalized in *Wilko,* now obsolete?

3. If it is obsolete, would this Court re-state its view of whether or not arbitrators may manifestly disregard the law ?

4. In Circuits which do recognize manifest disregard as grounds for vacating an arbitration award, the district courts have established various standards for determining "manifest disregard" (*See below*). Would this Court establish a standard by which arbitrators and judges, as well as the parties, may be commonly guided ?

5. Based on *Miller v. Prudential*, its ruling in this case, and the fact that there is no manifest disregard in Fourth Circuit law, the doctrine of "legal error" would appear to be absolute in the Fourth Circuit. Is this true? Setting aside manifest disregard of the applicable statute or regulation, is there no other circumstance which would mitigate a ruling of "legal error"?

6. For example: Is the doctrine of "legal error" applicable to an arbitration award where a majority of the panel consists of attorneys; in effect, can attorneys be said to be "untrained in the law"?

7. Further: Is the doctrine of "legal error" applicable to an arbitration award when a panel, consisting of a majority of attorneys, retires to read the only ruling precedent bearing on the principal issue in the case, acknowledges for the record that it has read the precedent, states that it will follow the precedent, then fails to do so ?

8. Can the doctrine of "legal error" apply to an arbitration award when a panel consisting of a majority of attorneys hears a confession of substantive perjury but disregards it?

9. Can the doctrine of "legal error" apply to an arbitration award where the defendant has, in both testimonial and documentary evidence, committed substantive perjury, confessed to it, then attempted to mitigate his confession?

10. Can the doctrine of "legal error" apply to an award where the arbitrators have been soaked in substantive and protracted perjury ? In effect, have their deliberations on the issues to be resolved been tainted by the perjury?

11. May a Respondent who has confessed to substantive perjury then mount a defense of "legal error" in judicial review?

12. Is such a defense a fraud on the court?

13. Was the district judge correct when he used evidence of substantive perjury to confirm "legal error" ?

14. Was the district judge correct in not addressing the preponderant evidence of substantive perjury when he denied Petitioner a trial under 12b-6 ?

15. Was the district judge correct in not addressing evidence that the arbitrators had suppressed discussion of the governing precedent in the case ?

16. Predispute arbitration agreements in the securities field state that they are governed by New York law. Under New York law arbitrators may not award punitive damages. Are arbitrators so restricted where there is diversity of citizenship and when the matter is exclusively a violation of federal securities law and regulations ?

Table of Contents

Questions Presented	1- 3
Parties: Footnote	4
Authorities	4
Opinions and Awards	4
Grounds	5
Citations	5-7
Regulations	7-9
Statement of The Case	10-17
Argument	17-18
Index	19-33

Authorities

Commercial Arbitration Under the Federal Law: Expanding The Scope of Judicial Review, 35 U. of Pittsburgh L. Rev. 799 (1974).

Opinions and Awards

On November 27, 1990, a panel of three arbitrators selected by and under the administration of The National Association of Securities Dealers, Inc. ("NASA') dismissed the Petitioner's claims in their entirety.

On April 22, 1991, the U. S. Court for the Eastern District of Virginia dismissed the Petitioner's Petition for Vacation of Arbitrators' Award. See Index. Pp. 22-30.

On February 21, 1992, the U.S. Court of Appeals for the Fourth Circuit affirmed.

* The names of all the parties appear in the caption of the case.

Grounds

On February 21, 1992, the U.S. Court of Appeals for the Fourth Circuit affirmed the lower court's dismissal of Petitioner's Petition for Vacation of Arbitrators' Award in an unpublished opinion in which it agreed with the reasoning of the district court order and memorandum issued April 22, 1991. The Court of Appeals has, in effect, made the order and memorandum of the district court its own. See Index, Pp. 20-21

This Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. Sec. 1254.

Citations

Wilko v. Swan (74, S. Ct. 182 (1953).

"While it may be true, as the Court of Appeals thought that a failure of the arbitrators to decide in accordance with the provisions of the Securities Act would constitute grounds for vacating the award pursuant to Section 10 of the Federal Arbitration Act that failure would need to be made clearly to appear. In unrestricted submissions...the interpretations of the law by the arbitrators *in contrast to manifest disregard* are not subject, in the federal courts, to judicial review for error in interpretation." *Majority Opinion, Chief Justice Reed*

"Arbitrators may not disregard the law...On this we are all agreed". *Dissent. Justice Frankfurter.*

Rodriquez de Quilas v. Shearson, 109, S. Ct. (1989)

"*Wilko* is overruled. It was incorrectly decided and is inconsistent with the prevailing uniform construction of other

federal statutes governing arbitration agreements in the setting of business transactions". *From the Syllabus.*

Merrill Lynch v. Bobker, 808 F. 2nd 930. (Second Circuit)

"In order for arbitration award to be vacated upon manifest disregard of the law error must have been obvious and capable of being readily and instantly perceived by average person qualified to serve as arbitrator, and arbitrator must have appreciated existence of clearly governing legal principle but decided to ignore or not pay attention to it."

Sidarma Societa Italiana v. Holt Marine, 515 F. Supp.. 1302 (1981), S.D.N.Y.

"Arbitration award will be vacated only on one of the grounds specified in arbitration act, or if conduct of arbitrators constituted 'manifest disregard' of applicable law."

Reynolds Securities Inc. v. MacQuown, 495 F. Supp.. 945 (1978)

"In order to have an award vacated on grounds of manifest disregard of law, complaining party must establish that the arbitrators understood and correctly stated the law but proceeded to ignore it".

Bell Aerospace v. Local 516 Intl. Union United Automobile Aerospace Workers, 356 F. Supp.. 354 (1973).

"In order to have an award vacated on grounds of manifest disregard of the law, the complaining party must establish that the arbitrator understood and correctly stated the law but proceeded to ignore it".

Clemons v. Dean Witter, 708 F. Supp. 62.

"An arbitration award need not be confirmed if arbitrator understood and correctly stated the law but proceeded to ignore it."

See also *Sweeney v. Morganroth* (1978, SD, NY) 451 F. Supp. 367. *Maidman v. O'Brien* (1979 SD, NY) 473 F. Supp. 25. *Stroh Container Co. v. Delphi Industries, Inc.* 783 F. 2nd 743 *Aerojet-General Corp. v. American Arbitration Assn.* 478 F. 2nd 248, *Concourse Beauty School v. Polakov* 685 F. Supp. 1311.

Fourth Circuit

Miller v. Prudential Bache Securities Inc., 884 F. 2nd 128, 130 4th Cir., (1989): *See* Index Pp. 32 for relevant text.

(SMA)

Manevich v. Francis I. duPont (338 F. Supp.. 1124 (1972) *See* Index, Pp. 33 for relevant text.

Regulations

12 CFR 220.2 (a) "Credit balance" means the cash amount due the customer in a margin account after debiting amounts transferred to the special memorandum account.

12 CFR 220.2 (d) "Debit balance" means the cash amount owed to the creditor in a margin account after debiting amounts transferred to the special memorandum account.

12 CFR 220.4 (b) (2) *Satisfaction of deficiency*. The additional required margin may be satisfied by a transfer from the special memorandum account or by a deposit of cash, margin securities, exempted securities, or any combination thereof.

12 CFR 220.4 (e) (2) Margin excess may be withdrawn or may be transferred to the special memorandum account (220.6) by making a single entry to that account which will represent a debit to the margin account and a credit to the special memorandum account.

12 CFR 220.5 (b) (1) *Short Sales*. The required margin for the short sale of a security shall be the amount set forth in 220.18 (the Supplement).

12 CFR 220.5 (b) (2) A short sale "against the box" shall be treated as a long sale for the purpose of computing the equity and the required margin.

12 CFR 220.115 (A short sale against the box) . . .shall not be deemed to be or treated as a short sale.

12 CFR 220.6 Special Memorandum Account.

(a) A special memorandum account (SMA) may be maintained in conjunction with a margin account.
A single entry amount may be used to represent both a credit to the SMA and a debit to the margin account. A transfer between the two accounts may be effected by an increase or reduction in the entry. When computing the equity in a margin account, the single entry amount shall be considered as a debit in the margin account. A payment

to the customer or on the customer's behalf or a transfer to any of the customer's other accounts from the SMA reduces the single entry amount.

(b) The SMA may contain the following entries:

(l) Dividend and interest payments.

(2) Cash not required by this part, including cash deposits deposited to meet a maintenance margin call or to meet any requirement of á self-regulatory organization that is not imposed by this part.

(3) Proceeds of a sale of securities or cash no longer required on any expired or liquidated security position that may be withdrawn under 220.4 (e) of this part; and

(4) Margin excess transferred from the margin account under 220.4 (e) (2) of this part.

12 CFR 220.18 Supplement. Margin Requirements. The require margin for each security position held in a margin account shall be as follows:

(a) Margin equity security, except for an exempted security or a long position in an option: 50 percent of the current market value of a security.

Statement of the Case

On October 25-26, 1990, a three-member arbitral panel selected by The National Association of Securities Dealers, Inc. ("NASD") met in a situs selected by the NASD (Richmond) to arbitrate a dispute between Sebastian C. Sisti ("Sisti") and Merrill Lynch, Pierce Fenner & Smith, Inc. ("Merrill Lynch") .

The panel consisted of two lawyers and one retired bank vice president, all selected by the NASD. One of the lawyers was the representative of the securities industry.

Until October 21, 1987, Sisti had been a Merrill Lynch customer for nearly 14 years. On October 21, two days after the Crash, his account was summarily closed out by the manager of Merrill Lynch's Richmond office for an alleged shortfall of $168 . At the time, Sisti was unaware that there were $91, 000 in credits in his Special Memorandum Account ("SMA") . Nor was he aware that the credits in his SMA were his money. Sisti 's account executive described the manager's behaviour as unconscionable.

In arbitration, the allegations included (a) embezzlement of Sisti 's SMA (b) illegal interest charges on short sales against the box (c) breach of fiduciary duty (d) malicious close-out of his account. At the hearing, Sisti presented a reconstruction of his account which showed that the amount embezzled from his SMA was $132,000.

Sisti also presented all of the regulations bearing on the issues to be resolved: 12 CFR 220.2, 220.,4, 220.5, 220.6, 220.18, 220.115, 220.116 (all parts of Regulation T) and SEC Rule 240.16b.

In addition to the relevant regulations, Sisti presented the only precedent governing the SMA (*Manevich v. Francis I. duPont. See supra for citation).* When Merrill Lynch objected to Sisti's reading of the relevant portion of the Court's opinion, the arbitrators retired to read the entire case. The chairman cautioned that there would be no discussion of *Manevich* when the panel returned. When the hearing was reconvened, the chairman acknowledged that the arbitrators had read *Manevich*. See Index, Pp. 33. In *Manevich*, the court (J. Pollack, Judge) ruled (a) that the SMA was like a bank account ("Thus the broker is correct. The SMA is like a bank account") and (b) transfers were permissible from the SMA to the margin account to meet initial margin requirements.

Throughout Sisti's direct presentation of his case, there were repeated questions by the arbitrators, and exhaustive responses by Sisti, regarding both the SMA and the regulation governing short sales against the box. (12 CFR 220.5, 220.15, 220. 116). During this period (the first day) one of the public arbitrators correctly stated the regulation governing the SMA (220.6).

The second day was dominated by the direct testimony of Merrill Lynch's margin specialist based on the documentary evidence of a submission titled: *"Analysis of a Typical Margin Account"*. In this document, the witness

averred that the SMA was "a line of credit like VISA or Mastercard". During more than two hours of direct testimony, the witness explained how and why the SMA was "a line of credit" as he responded to a cascade of questions from the arbitrators.

During his testimony, one of the public arbitrators asked the witness if the credits in the SMA were the customer's money "It's not his money", snapped the witness.

The same arbitrator asked the witness if all of his testimony conformed to the regulations of The Federal Reserve Board and to the rules of The New York Stock Exchange. The witness replied that "to the best of his knowledge it did".

The witness also averred that Sisti's account was treated as every other margin account was treated at Merrill Lynch. Investigation by two attorneys following the hearing revealed that Merrill Lynch does send "SMA checks" to the wary, but to the unwary it plays mum, secreting the fact that the cash portion of the SMA is the customer's money until the statute of limitations expires. After that, it pockets the funds.

At two points during the witness's direct testimony, Sisti vehemently characterized the entire performance as a "misrepresentation of Regulation T". Then in cross-examination Sisti demanded that the witness cite where in Regulation T he found permission to call excess margin (the SMA) "a line of credit like VISA or Mastercard". Flustered and exposed, the witness confessed: "No regulation in terms of line of credit. That's just a term we apply to it."

In the arguments for and against punitive damages, Merrill Lynch reminded the panel that, under New York law, arbitrators cannot award punitive damages. Since the contract stated that it would be governed by the laws of New Y ork, Merrill Lynch contended that the panel could not award punitive damages in this case.

Despite the evidence that Merrill Lynch's margin specialist had lied under oath for more than two hours; despite, law, regulation and precedent, on November 27, 1990 the panel unanimously dismissed Sisti's claims in their entirety. On February 26, 1991, Sisti petitioned the U.S. District Court for the Eastern District of Virginia to vacate the award of the panel on grounds provided by 9 U.S.C. Sec. 10 (b) (c) and (d). The district court had subject matter jurisdiction over the controversy pursuant to 28 U. S. C. Sec 1331, the Federal Arbitration Act, 9 U.S. C. Sec. 10, and 28 U. S. C. Sec. 1332 (a) (2) by virtue of complete diversity between the parties. Venue was also proper pursuant to 28 U. S. C. Sec. 1391 (a) and the FAA.

Chiefly, the petition alleged that Merrill Lynch had misrepresented Sisti's SMA as "a line of credit" and that the arbitrators had manifestly disregarded the applicable regulations.

Merrill Lynch filed a motion to dismiss Sisti's petition to vacate the award on grounds that Sisti had failed to state a claim for relief under 12 (b) (6). Merrill contended that Sisti had failed to state a basis for vacatur because:

"It is a well-established principle that courts cannot vacate arbitration awards on the ground that the panel has committed errors of law. 'Federal courts have consistently held that they will not set aside an arbitrator's award for mere errors of law'."

Outraged by Merrill Lynch's blatant distortion of the Federal record and by the cynicism with which it marched into Federal court claiming "legal error", Sisti's motion in opposition argued that there had been no "error" and that the arbitrators were fully aware of the applicable regulations. Sisti revealed that the arbitrators had read, and declared that they had read, the only ruling precedent in the case (*Manevich)* and had then suppressed any discussion of the precedent. In the motion in opposition, Sisti produced statements by a majority of the panel in which they clearly stated the applicable regulations. Attached to the motion in opposition, Sisti produced 6 of what turned out to be 170 pages of false testimony by Merrill Lynch's margin specialist regarding the regulations governing the SMA.

The issue of whether or not the arbitrators had manifestly disregarded the law or had erred in interpretation of the law was joined at oral argument. The district judge intervened to ask Sisti if he had read *Miller v. Prudential Bache*. Sisti said he had and reached for his notes on *Miller*.

"Well", said the district judge, "it simply says that the court cannot vacate arbitration awards on the ground that the panel has committed errors of law".

Sisti continued to protest that there had been no error in interpretation of the law but rather manifest disregard of it. At that point counsel for Merrill Lynch rose to declaim:

"I think we have already made clear disregard of the law is not the basis under Fourth Circuit law for setting aside an arbitration award".

Sisti then finally understood that what Merrill Lynch had referred to as "well-established by the courts" was really the established position of the Fourth Circuit.

In his memorandum dismissing Sisti's petition the district judge wrote:

"It is well-settled that courts cannot vacate arbitration awards on the ground that the panel has committed errors of law".

The issue was joined again in Sisti's appeal to the Fourth Circuit where, invoking *Wilko v. Swan*, Sisti challenged the district court's failure to distinguish between "manifest disregard" and "legal error".

Quoting from the long list of court rulings cited above in which the courts had ruled that arbitration awards would be vacated where there was manifest disregard of the law, Sisti challenged the lower court's implication that federal courts uniformly embraced the doctrine of "legal error".

Sisti maintained that the historical rationale excusing experts in a given field of commerce for errors in the law (because they were untrained in the law) was inapplicable in this case for two reasons: one, the SMA was

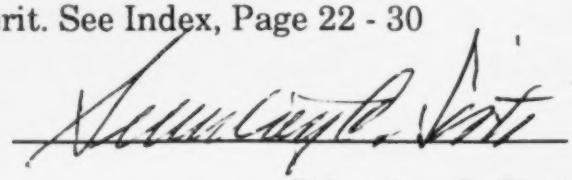
a fact of law not a fact of commerce; two, a majority of the arbitrators were lawyers selected by the NASD precisely because it recognized that the key issues of the dispute were facts of law and not facts of commerce. In effect, lawyers constituted the majority of the panel precisely because they were trained in the law.

Sisti also contended that even if the Court were correct in its estimate of error in interpretation of the law by the arbitrators, the Court was faced with the evidence that the error had been induced by Merrill Lynch's hours-long perjury and was therefore inadmissible in a court of law as grounds for anything.

In effect, Sisti argued that even if one were to concede that two lawyers cannot read or understand simply-written law and regulation, one would have to acknowledge that in this case that hypothetical failure was tainted by Merrill Lynch's perjury.

Sisti contended that the arbitrators were not duped. They had read the ruling precedent; they had listened to the applicable regulations as Sisti read them aloud; they had asked questions about them; at two separate points a majority of the arbitrators stated the applicable regulations (a most severe test); they heard the perjured testimony of Merrill Lynch's margin specialist; heard his confession; they then ignored confession, concession, precedent and regulations to find for Merrill Lynch.

On February 21, 1992, the Fourth Circuit concurred with the lower court's legal reasoning and declared Sisti's appeal to be without merit. See Index, Page 22 - 30



Sebastian C. Sisti
Pro Se

Argument

Stripped to its bare essentials, there is really only one issue before this Court: Can the Second Circuit and the Fourth Circuit diverge on their application of the doctrine of manifest disregard ?

The principal inequity in this divergence of the Circuits is that it makes citizens of New York State more equal before federal law than citizens of Virginia, Maryland, West Virginia and North Carolina.

This inequity is compounded in securities arbitration where the director of arbitration of the self-regulated organization administering the arbitration has absolute power to choose the situs. But even if his or her power were not absolute, citizens of the Fourth Circuit who could not afford to travel to New York, or who were unaware that the Circuits were in conflict on this important issue, would still be less equal before federal law than citizens of New York or those who could afford to travel to New York.

The divergence also invites abuse of the system by parties who invoke the doctrine of manifest disregard in one Circuit and deny it in another. Abuse of the system

extends to false swearing to induce arbitrator error on the certainty that "legal error" is not grounds for vacating an arbitrator's award in a particular circuit. This temptation is heightened in Virginia where it is well-known that the Commonwealth's Attorneys rarely prosecute perjury.

The divergence therefore justifies this Court's exercise of its power of supervision. The need for this Court's supervision is augmented by the reversal of *Wilko* which gives the appearance that this Court intends that the test of manifest disregard first formalized there be made obsolete.

Petitioner is a layman and therefore treads lightly on ground well-traveled by the finest minds in the law. But it would appear that what in fact has become obsolete is the doctrine of "legal error". England, which has been the mother of so much of our own law, has long since constrained that doctrine in ways that largely preclude the possibility that arbitrators can err in their interpretation of the law while prizing their expertise in a given field of commerce. "There must be no Alsatia in England where the kinq's writ does not run", cried a famous barrister (L.J. Scrutton) more than sixty years ago and so it came to pass.

Index

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

SEBASTIAN C. SISTI,
Plaintiff-Appellant,

v.

MERRILL LYNCH, PIERCE, FENNER AND SMITH, INCORPORATED,
Defendant-Appellee.

No. 91-2544

Appeal from the United States District Court
for the Eastern District of Virginia, at Richmond.
Robert R. Merhige, Jr., Senior District Judge.
(CA-91-102-R)

Submitted: December 6, 1991

Decided: February 21, 1992

Before SPROUSE and WILKINS, Circuit Judges, and CHAPMAN, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

COUNSEL

Sebastian C. Sisti, Appellant Pro Se. John Charles Thomas, Edward Joseph Fuhr, HUNTON & WILLIAMS, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Sebastian C. Sisti appeals from the district court's order dismissing his Petition to Vacate Arbitration Award. Our review of the record and the district court's opinion discloses that this appeal is without merit. Accordingly, we affirm on the reasoning of the district court. *Sisti v. Merrill Lynch*, No. CA-91-102-R (E.D. Va. Apr. 22, 1991). However, Merrill Lynch's request for costs and attorneys' fees resulting from this appeal is denied. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decisional process.

AFFIRMED

ORDER

For the reasons stated in the Memorandum this day filed and deeming it just and proper so to do, it is hereby ORDERED AND ADJUDGED:

Defendant's Motion to Dismiss is GRANTED and this action stands DISMISSED.

Plaintiff is reminded of his right of appeal to the United States Court of Appeals for the Fourth Circuit. In order to effect any appeal, Plaintiff must notify the Clerk of the Court, in writing, within thirty (30) days of this date of his intention to appeal. Failure to so do may result in loss of the right to appeal.

Let the Clerk send a copy of this Order and the Memorandum to the Plaintiff and to counsel of record.

Robert R. Merhige, Jr.

United States District Judge

Dated: April 22, 1991

MEMORANDUM

"This matter is before the Court on the Motion of the Defendant Merrill Lynch, Pierce, Fenner & Smith, Inc., to dismiss the instant Petition for failure to state a cause of action, pursuant to Federal Rule of Civil Procedure 12(B)(6). Sisti, who proceeds pro se, filed this action to vacate a decision of an arbitration panel denying him relief in the underlying action against Merrill Lynch. Defendant argues that, taken as true, Plaintiff Sisti's allegations fail to state an actionable claim for relief.

BACKGROUND

"On June 9, 1980, Sisti opened a margin account with Merrill Lynch. Sisti signed a standard customer agreement that included a provision mandating binding arbitration of any disputes between the parties. Sisti subsequently invested several hundred thousand dollars through Merrill Lynch. He closed the account in October 1987. In May 1989, Sisti initiated these proceedings against Merrill Lynch, filing a claim with the National Association of Securities Dealers, as required by his customer agreement. He alleged that Merrill Lynch had unlawfully charged him interest on certain accounts and had engaged in fraudulent activity in his margin account and Special Memorandum Account. He claimed $600,296 in compensatory damages and $250,000 in punitive damages.

"On October 25-26, 1990, Sisti presented his claim to an arbitration panel whose members were Mark

Rubin, James Tucker and William Lane. After this hearing, the panel dismissed the claims "in all respects", rendering a "full and final resolution of the issues submitted for determination." In February 1991, Sisti filed this Petition to Vacate Arbitration Award, alleging arbitrator misbehavior, bias, and disregard of the law. The Petition requests that this Court vacate the arbitration decision, enter judgment for Sisti and award him compensatory and punitive damages, as he had requested in the arbitrated claims. Merrill Lynch argues that his Petition fails to state a sufficient basis for relief from the arbitrator's decision.

DISCUSSION

"Merrill Lynch argues that Sisti has failed to state a claim for vacating the decision of the arbitration panel that heard his complaint. [1] The federal courts endow binding arbitration awards a significant presumption of validity, *City of Parkersburg, W.VA. v. Turner Constr. Co.*, 612 F.2d 155, 156 (4th Cir. 1980), generally confine review of such awards to determining whether one of the statutory grounds for vacating an award exists. *National R.R. Passenger Corp. v. Chesapeake & 0. Ry. Co.*, 551 F.2d 136 (7th Cir. 1977).

[1] In its motion, Merrill Lynch also asserted that it would be improper for this Court to order the requested relief. Both because the Court will decide the Motion to Dismiss in favor of the Defendants and because at oral argument Mr. Sisti appeared to abandon his prayer for relief other than vacation of the arbitration decision, the Court will not address the merit of this claim.

"Sisti's Petition to Vacate alleges violations of the Federal Arbitration Act ("the Act"), 9 U. S. C. § 1 et seq. Under the Act , all binding arbitration awards are final except in four cases:

> *(a) Where the award was procured by corruption, fraud, or undue means.*
>
> *(b) Where there was evident partiality or corruption in the arbitrators, or either of them.*
>
> *(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy or of any other misbehavior by which the rights of any party have been prejudiced.*
>
> *(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.*

"9 U.S.C. § 10. This Section also authorizes the Court to vacate the panel decision and direct rehearing in the case of a violation. Id. It does not instruct or authorize the Court to reverse the decision of the panel or to enter its own decision on the merits.

"Merrill Lynch argues that Sisti has failed, in any of his three claims, to present a valid basis for vacating the award of the arbitrators and that, therefore, the Complaint should be dismissed.

"I. Count I

"Sisti alleges in Count I that the arbitration award should be vacated because the panel "disregarded the proper law." Sisti argues that Merrill Lynch charged him interest on certain investment accounts in violation of three federal securities regulations and that Merrill Lynch misrepresented his SMA account as a line of credit. Sisti asserts that the panel disregarded the applicable law to find in favor of Merrill Lynch and argues that a proper application of the law would necessitate a verdict in his favor, a verdict which he asks this Court to enter.

"It is well-settled that courts cannot vacate arbitration awards on the ground that the panel has committed errors of law. *Miller v. Prudential Bache Securities, Inc.*, 884 F.2d 128, 130 (4th Cir. 1989) (refusing to set aside arbitrator's award on basis of "mere error of law" or contract misinterpretation). Merrill Lynch argues that Count I alleges nothing other than legal error on the part of the arbitrators and that this Court may not vacate the award on this basis.

"In his memo in opposition Sisti confirms Merrill Lynch's argument. At great length, Sisti argues that he has stated a claim in Count I because his legal claim is so clear that there is no explanation for the arbitrators' decision other than that they knowingly disregarded the law. With this Count, Sisti thus asks the Court to vacate the arbitrators' decision, essentially, because he contends that it was clearly wrong and because, he claims, he has a valid

claim. The Court concludes that regardless of the verbiage used, Sisti's contention amounts to an argument of legal error, an argument that fails to present a valid reason to vacate an arbitration judgment.[2]

"Count I also alleges that the arbitrators failed to reach a final and definite award upon the subject matter, in violation of 9 U.S.C. § 10(d). The arbitration decision itself, however, states that the award is final and definite. It simply is final and definite against Sisti. His argument that it is not final must fail.

"II. Count II

"In Count II of the Petition to Vacate, Petitioner alleges that the panel engaged in "misbehavior" in violation of 9 U.S.C § 10(c). In particular, Sisti argues that the panel allowed George T. Baskerville, Manager of Merrill Lynch's Richmond office to remain in the room during the proceeding even though he was to testify. Sisti alleges that this was error because he asked for all witnesses to be excluded, other than corporate representatives. Sisti did not, however, object to Baskerville's remaining in the hearing room. Baskerville apparently was, in fact, Merrill Lynch's corporate representative (though Sisti argues that the corporate representative had been, all along, Arthur Sobel—Merrill Lynch's attorney).

Merrill Lynch argues that Sisti's claim is without merit regardless of Baskerville's status because it cannot

2 At oral argument, Sisti asserted that though the arbitrators were cognizant of what Sisti contends is the law and knew that to be the law, they simply "disregarded its proper application."

be arbitrator misbehavior to allow a witness to attend a proceeding. Paragraph 28 of the Code of Arbitration Procedure provides: "The attendance or presence of all persons at hearings shall be determined by the arbitrators." Merrill Lynch argues that there is no basis for asserting arbitrator misbehavior where the arbitrators have discretion. In contrast and quite plainly, Sisti argues that the conduct was misbehavior because it unfairly prejudiced his rights.

"The Court concludes that no facts alleged in the Petition support Petitioner's legal conclusion. Baskerville apparently was Merrill Lynch's corporate representative at the time of the hearing. During the course of the hearing, the panel, as well as Sisti, recognized him as such. In addition, the arbitration panel had discretion to allow witnesses to remain in the hearing or to exclude them. It does not appear that the panel treated Sisti in a fundamentally unfair manner that demands vacating the award on this count.

"III. Count III

With his final count, Sisti argues that the arbitrators displayed "evident partiality" in violation of 9 U. S. C. § 10(b). The burden on a claimant for vacation of an arbitration decision due to "evident partiality" is high. To succeed on such a claim, the petitioner must establish specific facts that indicate improper motives on the part of the arbitrators. See *Sheet Metal Workers Int'l Ass'n v. Kinney Air Conditioning Co.*,756 F. 2d 742, 746 (9th Cir. 1985); *International Produce, Inc. v. Rosshavet*, 638 F. 2d 548, 551 (2d Cir.), cert. denied, 451 U. S. 1017 (1981). These

facts must establish that " a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration." *Morelite Constr. Corp. v. New York City District Council Carpenters Benefits Funds*, 748 F. 2d 79, 84 (2d Cir. 1984). Federal courts have concluded that evident partiality may not be shown by alleged procedural or evidentiary errors, by legitimate efforts to move the case along, or by failure to follow the rules of evidence.

"Sisti alleges that the panel's "evident impartiality" is evidenced by a procedural or evidentiary error, rather than by improper motives or relationships. Sisti alleges that during the testimony of Mr. Belfiore (a Merrill Lynch witness) a panel member interrupted Belfiore and posed several questions to Merrill Lynch's counsel (Arthur Sobel) and to Mr. Baskerville. The panel chair then asked Belfiore whether he adopted Sobel and Baskerville answers as his testimony. He replied that he did. On this basis Sisti argues that a reasonable person would conclude that the panel demonstrated evident impartiality toward Merrill Lynch. Sisti also states that the Panel interrupted him several times while cross examining a witness and during his closing statement.

"While the Court does not endorse the Panel's method of questioning, as described by Sisti, it far from requires conclusion of bias against either party. An arbitration panel is obligated to determine the facts at issue, and directly asking a witness questions is a method of seeking those facts. Although interrupting a witness during his examination to ask those questions may be distracting and somewhat disturbing, without more, it does not display bias on the part of the arbitrators.

"For the foregoing reasons, the Court concludes that Count III suffers the same deficiency as the preceding two counts—it fails to state an actionable claim for relief from the decision of the arbitration panel. The Petition thus must be dismissed.

An appropriate Order will issue."

ROBERT R. MERHIGE, JR.

UNITED STATES DISTRICT JUDGE

Date: 22 Apr 1991

United States Court of Appeals, Second Circuit
Merrill Lynch, Pierce, Fenner & Smith, Inc., Petitioner-Appellee v. Jack Bobker, Respondent-Appellant

Argued Oct. 30,1986. Decided Dec. 23, 1986.
808 F. 2nd 930 at 933

DISCUSSION

(l) "Manifest disregard of the law" by arbitrators is a judicially-created ground for vacating their arbitration award, which was introduced by the Supreme Court in *Wilko v. Swan, 346 U.S. 427, 436-37, 74 S.Ct. 182, 187-88, 98 L. Ed. 168* (1953). It is not to be found in the federal arbitration law. 9 U.S.C. Sec. 10. Although the bounds of this ground have never been defined, it clearly means more than error or misunderstanding with respect to the law. *Siegel v. Titan Indus. Corp. 779 F. 2nd 891, 892-93 (2nd Cir.* 1985); *Drayer v. Krasner, 572 F. 2nd 348, 352 (2nd Cir.), cert. denied, 436 U.S. 948, 98 S. Ct. 2855, 56 L/ Ed. 2nd 791* (1978); *I/S Stavborg v. National Metal Converters Inc. 500 F. 2nd 424, 432 (2nd Cir.* 1974). The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term "disregard" implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore it or pay no attention to it. *Bell Aerospace Company Division of Textron, Inc. v. Local 516*, 356 F. Supp. 354, 356 (W. D. N. Y. ,1973), rev'd on other grounds, 500 f. 2nd 921 (2nd Cir. 1974)."

United States Court of Appeals, Fourth Circuit
Frieda Miller, Plaintiff-Appellant v. Prudential-Bache Securities, Inc., and Samuel Kaplan, Defendant-Appellee.

Argued May 8, 1989. Decided Aug. 29, 1989.
884 F. 2nd at 130-131

"Even if Miller's argument is that the panel either misinterpreted or misapplied the applicable law - in this case either the borrowing statute or Rule 15 - there still exists no basis for overturning the panel's decision. Once again, federal courts have consistently held that they will not "set aside an arbitrator's award for mere errors of law", *Textile Workers Union of America*, supra, at 896. See also *Revere Copper and Brass, Inc. v. Overseas Inv. Corp., 628 F. 2nd 81 (D. C. Cir.* 1980) (arbitrators' award will not be set aside for failure to apply the traditional rules of contract construction); *Office of Supply, Gov. of Republic of Korea v. New York Naval Co., 469 F. 2nd 377, 379* (2nd Cir. 1972) ("An award will not be set aside because of an error on the part of the arbitrators in their interpretation of the law"); *National R. R.*, supra, at 143 ("It is well settled that an arbitrator's award will not be vacated on the grounds that the arbitrators misinterpreted applicable law").

United States District Court, S. D. N. Y. Feb 28, 1972
Samuel Manevich, Plaintiff v . Francis I. duPont et al.
338 Federal Supplement at 1128

(1) The suggestion is offered on defendant's behalf that 12 CFR 220.4 (f) (1) supplies the basis for transfers of credit from the SMA to cover the margin purchases. That regulation authorizes use of credit in the SMA " to meet the emergency need of any creditor." Self-evidently, however, there is no emergency to a practice maintained by brokers on a day-to-day or transaction-to-transaction basis. Consequently, we may not look to 220.4 (f) (1) as the basis for an accounting transfer to make up the initial margin requirements on purchases.

(2) The regulation which does ground the use of SMA credit for purposes of complying with Regulation T in margin purchases is 220.4 (f) (6). This, in pertinent part, reads as follows:

In a special miscellaneous account, a creditor may: (6) . . . Pay out or deliver to or for any customer, any money or securities. (Emphasis supplied.)

If a broker can "pay out" to a customer "any money" the customer has in his SMA, then the broker can "pay out" that value to any other account of the customer, including a margin account, instead of simply handing over cash. Thus the analogy to a bank account, pressed by the brokers, is fairly accurate.

Supreme Court, U.S.
FILED
JUN 23 1992
OFFICE OF THE CLERK

(2)

No. 91-1875

In The

Supreme Court of the United States

October Term, 1991

SEBASTIAN C. SISTI,

Petitioner,

vs.

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

EDWARD J. FUHR
HUNTON & WILLIAMS
951 East Byrd Street
Richmond, Virginia 23219
(804) 788-8201

Counsel for Respondent

2171
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

QUESTION PRESENTED

Sebastian Sisti's questions presented section alleges a circuit court split that does not exist and relates to matters irrelevant to the single issue in this case:

1. Whether the Court of Appeals for the Fourth Circuit and the District Court for the Eastern District of Virginia correctly concluded that Sisti failed to state a basis under the Federal Arbitration Act for vacation of an arbitration award.

PARTIES TO THE PROCEEDING

The petitioner is Sebastian C. Sisti ("Sisti"), a *pro se* arbitration claimant, plaintiff, appellant and petitioner. The respondent is Merrill Lynch, Fierce, Fenner & Smith, Inc. ("Merrill Lynch").

STATUTE INVOLVED

Section 10 of the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, has a direct bearing on the proper disposition of this case. That section defines the limited circumstances in which a binding arbitration award may be vacated.

> In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the application —
>
> (a) Where the award was procured by corruption, fraud, or undue means.
>
> (b) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
>
> (e) Where an Award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

9 U.S.C. § 10 (1976).

TABLE OF CONTENTS

Page

Question Presented i

Parties to the Proceeding ii

Statute Involved iii

Table of Contents iv

Table of Citations v

Counterstatement of the Case 1

Reasons for Denying the Writ 4

I. Sisti's contention that there is a split in the circuit courts on the question of manifest disregard of law is wrong. 4

II. Whether arbitration awards may be vacated for manifest disregard of law is irrelevant to the disposition of this case. 6

III. Sisti's petition is replete with factual errors. 7

Conclusion 9

Contents

Page

TABLE OF CITATIONS

Cases Cited:

City of Parkersburg, W. Va. v. Turner, Constr. Co., 612 F.2d 155 (4th Cir. 1980) 7

Merrill Lynch, Pierce, Fenner & Smith v. Bobker, 808 F.2d 930 (2d Cir. 1986) 5

Miller v. Prudential Bache Securities, 884 F.2d 128 (4th Cir. 1989) 3, 5, 6

National R.R. Passenger Corp. v. Chesapeake & O. Ry. Co., 551 F.2d 136 (7th Cir. 1977) 7

Office of Supply, Govt. Republic of Korea v. New York Naval Co., 469 F.2d 377 (2d Cir. 1972) 7

Refino v. Feuer Transp., Inc., 480 F. Supp. 562 (D.C.N.Y. 1979), aff'd, 633 F.2d 205 (2d Cir. 1980) 7

Upshur Coals Co. v. United Mine Workers, 933 F.2d 225 (4th Cir. 1991) 5

Statutes Cited:

9 U.S.C. § 1, et seq. iii

9 U.S.C. § 10 (1976) ..... iii, 2

Contents

Page

Rules Cited:

Federal Rule of Civil Procedure 12(b)(6) 2

United States Supreme Court Rule 21.5 8

No. 91-1875

In The

Supreme Court of the United States

October Term, 1991

SEBASTIAN C. SISTI,

Petitioner,

vs.

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

Sisti's statement of the case is replete with misrepresentations of law and misstatements of fact. Merrill Lynch believes it is necessary, therefore, to state the case as it should have been stated at the outset.

On June 9, 1980, Sisti opened a margin account with Merrill Lynch. He signed at that time a standard Merrill Lynch Customer Agreement. Sisti subsequently invested thousands of dollars in a variety of securities investments. Sisti pursued his own novel investment strategies. In the serious market drop of 1987, Sisti lost most of his investments. In October 1987 Merrill Lynch closed Sisti's account.

On May 4, 1989, Sisti filed a *pro se* demand for arbitration with the National Association of Securities Dealers, Inc. Sisti alleged there that Merrill Lynch had unlawfully charged him interest on certain accounts and had engaged in a widespread scheme to defraud him and countless others by its handling of customers' Special Memorandum Accounts.

On October 24-26, 1990, an arbitration panel conducted hearings in Richmond Virginia. Sisti represented himself throughout the hearings.

On November 27, 1990, the panel returned its Award. The Award stated that the "claims by the Claimant Sebastian C. Sisti be and hereby are dismissed in all respects."

On February 27, 1991, Sisti filed in the Eastern District of Virginia, Richmond Division, a *pro se* Petition to Vacate Arbitration Award. The petition purported to state a claim for vacation of the arbitration award under the Federal Arbitration Act, 9 U.S.C. § 10. Despite the opportunity to do so, Sisti did not have the arbitration hearings transcribed and made a part of his petition.

On March 21, 1991, Merrill Lynch moved the court to dismiss the petition for failure to state a basis for vacation of an arbitration award, pursuant to Federal Rule of Civil Procedure 12(b)(6).

Merrill Lynch based its motion on the ground that Sisti's petition to vacate, as evidenced by the record and pleadings before the district court, stated nothing more than a claim of legal error on the part of the arbitrators and that an award could not be vacated under the Arbitration Act on such a basis.

The district court agreed. On April 22, 1991, the District Court dismissed Sisti's petition in a thorough Memorandum Opinion. The Court found that Sisti had "confirm[ed] Merrill Lynch's argument" that he had stated at best a claim of legal error.

The court also noted that at oral argument Sisti asserted that the arbitrators knew the law but "simply disregarded its proper application." Mem. Op. at 5. The District Court concluded, however, that "regardless of the verbiage used, Sisti's contention amounts to an argument of legal error, an argument that fails to present a valid reason to vacate an arbitration judgment." *Id.* "It is well-settled that courts cannot vacate arbitration awards on the ground that the panel has committed errors of law." *Id.* (*citing Miller v. Prudential Bache Securities*, 884 F.2d 128, 130 (4th Cir. 1989).

Thus, contrary to what Sisti has advised this Court, the district court held that an allegation of legal error was insufficient for vacatur; it did not hold that manifest disregard of the law by an arbitration panel was insufficient. Indeed, the issue of manifest disregard was never addressed by the Court because Sisti was found to have alleged only errors of law. The district court followed, therefore, the well-settled law that courts cannot vacate arbitration awards where all that has been alleged is that the panel committed errors of law.

On May 20, 1991, Sisti filed a notice of appeal to the fourth circuit. The fourth circuit promptly directed the parties to proceed with informal briefs.

On February 21, 1992, the Fourth Circuit issued a one paragraph per curiam opinion affirming the District Court's opinion "on the reasoning of the district court." The Fourth Circuit held that its "review of the record and the district court's opinion discloses that this appeal is without merit." The Fourth Circuit did not use, reference, or rely on the doctrine of manifest disregard of the law that Sisti has made the centerpiece of his petition for certiorari.

REASONS FOR DENYING THE WRIT

The Court should deny the petition for certiorari for numerous reasons. First and foremost, the lower courts properly concluded that Sisti had failed to state a basis under the Arbitration Act to vacate an arbitration award. Given the finding that Sisti had alleged mere errors of law, which finding has not and cannot be challenged, the lower courts had no alternative but to conclude that Sisti had failed to state a cognizable claim for vacation of an arbitration award. Indeed, but for this Court's admonition that counsel has an "obligation" to "point out perceived misstatements" in the petition for certiorari, Sisti's patently frivolous petition would not merit a reply. Sisti, however, has taken tremendous liberties in his presentation of the facts and law to this Court.

I.

SISTI'S CONTENTION THAT THERE IS A SPLIT IN THE CIRCUIT COURTS ON THE QUESTION OF MANIFEST DISREGARD OF LAW IS WRONG.

Sisti petitions this Court to grant a writ of certiorari to resolve a circuit split that does not exist. He does so, moreover, on an issue that has not been at any time the basis of any judicial decision in this case. Let the record be clear: there is no split in the circuit

courts with respect to whether an arbitration award may be vacated upon a showing of manifest disregard of the law.

Contrary to what Sisti has advised this Court, the Fourth Circuit shares the view of its sister circuits that an arbitration award may be vacated where there has been manifest disregard of the law by an arbitration panel. *Compare Upshur Coals Co. v. United Mine Workers*, 933 F.2d 225, 229 (4th Cir. 1991) ("a legal interpretation of an arbitrator may [] be overturned where it is in manifest disregard of the law") *with Merrill Lynch, Pierce, Fenner & Smith v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1986) ("Manifest disregard of the law by arbitrators is a judicially-created ground for vacating their arbitration award . . . . Although the bounds of this ground have never been defined, it clearly means more than error or misunderstanding with respect to the law . . . . Judicial inquiry under the 'manifest disregard' standard is therefore extremely limited.").

It is not surprising that Sisti does not cite in his petition any case law to support his bald allegation that the Fourth Circuit does not recognize the doctrine of manifest disregard of law. Indeed, the only Fourth Circuit case cited by Sisti stands for the unremarkable proposition that mere errors of law are not a proper basis for vacatur under the Federal Arbitration Act. *See Miller v. Prudential-Bache Securities, Inc.*, 884 F.2d 128, 130 (4th Cir. 1989) ("federal courts have consistently held that they will not set aside an arbitrator's award for mere errors of law."). *Miller* does not address at all the doctrine of manifest disregard. Thus, the one case cited by Sisti is entirely irrelevant to the question of whether manifest disregard of the law is a proper basis for vacatur.

The Fourth Circuit case that does directly address application of the manifest disregard doctrine, *Upshur Coals Co.*, is not even mentioned by Sisti. The reason may be guessed. It belies any

suggestion that the Fourth Circuit approach to the doctrine is any different from that of the Second Circuit.

In short, the alleged circuit split on which Sisti so heavily relies does not exist. Because there is no divergence on this issue, Sisti's petition for certiorari should be denied. As Sisti states in his petition: "Stripped to its bare essentials, there is only one issue before this Court: Can the second circuit and the fourth circuit diverge on their application of the doctrine of Manifest disregard." Petition for Cert. at 17.

II.

WHETHER ARBITRATION AWARDS MAY BE VACATED FOR MANIFEST DISREGARD OF LAW IS IRRELEVANT TO THE DISPOSITION OF THIS CASE.

The question whether proof of a manifest disregard of law states a basis for vacatur is unrelated to any issue in this case. Neither the district court nor the Fourth Circuit applied or refused to apply the doctrine of manifest disregard of law. The reason is plain. Sisti did not allege a claim of manifest disregard of law.

Indeed, the district court expressly found that Sisti alleged "legal error," not "manifest disregard of law." As the court found, "regardless of the verbiage used, Sisti's contention amounts to an argument of legal error, an argument that fails to present a valid reason to vacate an arbitration judgment." Because the legal authority is monolithic and overwhelming that mere legal error by an arbitration panel does not state a basis for vacation of an arbitration award, the district court correctly dismissed Sisti's claim, and the Fourth Circuit properly affirmed that determination. "[F]ederal courts have consistently held that they will not set aside an arbitrator's award for mere errors of law." *Miller v. Prudential Bache Securities, Inc.*, 884 F.2d 128, 130 (4th

Cir. 1989), *citing Office of Supply, Govt. Republic of Korea v. New York Naval Co.*, 469 F.2d 377, 379 (2d Cir. 1972) ("An award will not be set aside because of an error on the part of the arbitrators in their interpretation of the law."). This conclusion follows directly from the fact that 9 U.S.C. § 10 does not reference errors of law as among the reasons a court may vacate awards. *See Refino v. Feuer Transp., Inc.*, 480 F. Supp. 562, 565 (D.C.N.Y. 1979), *aff'd*, 633 F.2d 205 (2d Cir. 1980) ("the grounds specified in section 10 . . . do not include mistakes of fact, errors of law, inadequate reasoning, or even arbitrary determinations.").

In short, the lower courts properly concluded that Sisti failed to state a basis under the Federal Arbitration Act for the vacation of an arbitration award.

As the district court found, "the federal courts endow binding arbitration awards a significant presumption of validity, *City of Parkersburg, W.Va. v. Turner Constr. Co.*, 612 F.2d 155, 156 (4th Cir. 1980), and generally confine review of such awards to determining whether one of the statutory grounds for vacating an award exists. *National R.R. Passenger Corp. v. Chesapeake & O. Ry. Co.*, 551 F.2d 136 (7th Cir. 1977)." When the district court found that Sisti had not stated such a ground, it properly dismissed the Petition to Vacate Arbitration Award.

III.

SISTI'S PETITION IS REPLETE WITH FACTUAL ERRORS.

In his petition for certiorari, Sisti argues that Merrill Lynch's witnesses "lied under oath for more than two hours" at the arbitration hearing when they discussed how they apply various securities regulations and how various accounts at Merrill Lynch operate. These charges by Sisti are not new. Nor are they true.

Indeed, since Sisti began his one man campaign years ago to smear the integrity of Merrill Lynch, he has resorted with increasing frequency to such rhetorical flights of fancy. Sisti makes these claims, as he always has, without citation to any evidence. Instead, Sisti questions whether a metaphor used by a Merrill Lynch witness was apt and whether a legal argument presented by counsel for Merrill Lynch was merited. This does not sustain Sisti's desperate charges.

Similarly, Sisti cites no evidence in the record to support his gross misstatements of the facts with respect to Merrill Lynch's handling of its customers' accounts. Rather, he hints conspiratorially of unknown, unidentified attorneys and their investigation after the arbitration hearing. None of this is anywhere in the record. As the evidence presented to the arbitration panel revealed, and as was found, Sisti's charges are wholly without merit.

Merrill Lynch suggests that the inaccuracies and misrepresentation of fact and law in the Petition for Certiorari violate Rule 21.5, Rules of the Supreme Court of the United States. They serve, therefore, as independent bases for dismissing the Petition.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied, and Merrill Lynch should be awarded its costs and fees herein expended.

Respectfully submitted,

EDWARD J. FUHR
HUNTON & WILLIAMS
951 East Byrd Street
Richmond, Virginia 23219
(804) 788-8201

Counsel for Respondent
Merrill Lynch, Pierce, Fenner
& Smith

Supreme Court, U.S.
FILED
JUL 23 1992
OFFICE OF THE CLERK

(3)

NO. 91-1875

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

Sebastian C. Sisti,

Petitioner

versus

Merrill Lynch, Pierce, Fenner & Smith, Inc.,

Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

APPELLANT'S REPLY BRIEF

Sebastian C. Sisti
1687 Capeway Road
Powhatan, VA 23139
804-598-4446

Questions Presented

Respondent dissembles with the question he presents. Count 1 of the petition to vacate was grounded in 9 U.S.C Sec. 10 (d) which is where legal experts find "manifest disregard of the law" in the statute (Federal Arbitration Act). The District Court for the Eastern District of Virginia and the Court of Appeals for the Fourth Circuit could not have correctly decided this case because they treated "manifest disregard", indeed, all disregard of the law by arbitrators, as legal error. *See* Miller.

The real issue in this case continues to be conflict among the Circuits regarding the test of manifest disregard and a unanimous disinclination by the Circuits to follow the standard established by the Court in *Mitsubishi / McMahon,* to wit: in statutory causes of action the Court expects that arbitrators will resolve the issue according to the requirements of the statute. *See* Pp 10-11.

Table of Contents

Question Presented	1
Citations	2
The Reply	4-13
a. Miller Treated Disregard of Law as Legal Error	4
b. Miller Incorrectly Decided So This Case Was Incorrectly Decided	5
c. Respondent Acknowledged Sisti's Count 1 as Disregard of Law.	5
d. Manifest Disregard Pervades all of Appellant's Petitions and Motions.	7
e. Who Is Misleading This Court ?	8
f. The Court's Ruling in McMahon.	10
Conclusion	12
Appendix (Exhibit 1)	14

Citations

Manevich v. Francis I. duPont, 338 F. Supp. 1124 (1972)

Merrill Lynch, Pierce, Fenner & Smith Inc. v. Jack Bobker, 808 F. 2nd 930 at 933 (quoted in Petition for Writ, P. 31).

Miller v. Prudential Bache Securities Inc.
884 F. 2nd 128, 130 4th Cir. (1989).

Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth Inc.
473 U.S., 636, 637 (1985)

Shearson/ American Express, Inc. v. McMahon
482 U.S., 232 (1987)

Rodriguez de Quijas v. Shearson/American Express., Inc.
109 S. Ct. 1917 (1989)

Upshur Coals Co. v. United Mine Workers,
933 F.2nd, 225 (1991).

The Reply

When the district judge wrote his order dismissing the petition to vacate (April 22, 1991) he was unaware that the Court of Appeals was about to recognize the existence of the doctrine of manifest regard for the first time in a case titled *Upshur Coals Co. v. United Mine Workers* (May 14- June 3, 1991).

Miller Treats Disregard of The Law as Legal Error

Until that day, the Court of Appeals had steadfastly refused to recognize manifest disregard as a valid basis for vacating arbitrators' awards. The ruling precedent in the Fourth Circuit in this regard was a case titled Miller v. Prudential Bache. In Miller, the Court of Appeals had declared:

"Even if Miller's argument is that the panel either misinterpreted or misapplied the applicable law - in this case either the borrowing statute or Rule 15 - there still exists no basis for overturning the panel's decision. Once again federal courts have consistently held that they will not set aside arbitrators' awards for mere errors of law". The Court of Appeals then cited four cases in which the courts had ruled that "It is well settled that an arbitrator's award will not be vacated on the grounds that the arbitrators misinterpreted applicable law". *See* Petition for Writ, P.32.

Miller Was Incorrectly Decided

Miller was clearly a statutory cause of action ("either the borrowing statute or Rule 15"). It was decided in 1989, two

years after *McMahon* where the Court ruled that in statutory causes of action it expects that arbitrators will resolve the issue according to the requirements of the statute.

Miller Was Incorrectly Decided
So This Case Was Incorrectly Decided

Because he was wholly unaware of the historic change of course impending in the Fourth Circuit, both at oral argument and in his Memorandum Opinion accompanying the order, the district judge applied *Miller* which denied that disregard of the law was a valid basis for vacating an arbitrator's award ("Even if...there still exists no basis.."). It was for this reason that the district judge denied the petition to vacate the award. In the Memorandum Opinion accompanying his order the district judge wrote:

"Sisti argues that he has stated a claim in Count 1 because his legal claim is so clear that there is no explanation for the arbitrators' decision other than that they knowingly disregarded the law...The court concludes that regardless of the verbiage used, Sisti's contention amounts to an argument of legal error, an argument that fails to present a valid reason to vacate an arbitration judgment". *See* Petition for Writ, Pp. 22-30 for full text of district court's opinion.

In a footnote to this commentary, the district judge corrected his misstatement of Appellant's Count 1. *See Petition for Writ, P. 27.*

Respondent's Counsel Proclaimed: That Fourth Circuit Law Did Not Recognize Manifest Disregard

Betraying uncanny adaptability, at oral argument Counsel who now argues that Appellant never claimed manifest disregard argued strenuously that Appellant had. Here's what he said:

"Most importantly of all, though, is that disregard of the law, even if proven, is not a basis for this court to vacate an award".

Ten minutes later, he repeated:

"I believe we have already made clear disregard of the law is not the basis under Fourth Circuit law for setting aside an arbitration award". *See* Exh. 1, P. 14 below, Transcript of Pre-Trial Hearing.

The district judge did not disabuse Respondent's counsel of what he might reasonably have regarded as a blockheaded misrepresentation of Fourth Circuit law for the reason that the judge himself believed that Fourth Circuit law did not recognize disregard of the law as grounds for vacating arbitrators' awards.

Court of Appeals Prejudicially Denied Appellant Grounds of Manifest Disregard

A chronology of the cases would leave no doubt that the Court of Appeals knew that it had just recognized the doctrine of manifest disregard in the *Upshur Coals* appeal but was knowingly and willfully denying application of the doctrine to the Sisti case where the evidence of manifest disregard was overwhelming and where the standards newly recognized by the Court of Appeals had been met.

Outrageous Falsehoods By A Respondent In Panic

On Page 6 of his Brief In Opposition, Respondent brutally and viciously distorts the facts: "Neither the district court nor the Fourth Circuit applied or refused to apply the doctrine of manifest disregard of the law. The reason is plain. Sisti did not allege a claim of manifest disregard of law". In the very next paragraph, Respondent states: "Indeed, the district court expressly found that Sisti had alleged 'legal error' and not 'manifest disregard of the law'". *Where* did the district judge say that *Sisti* had alleged legal error ? *See* Page 5, *supra*. Also see full text of district court order, Petition for Writ, Pp. 22-30.

Manifest Disregard Pervades All Of Appellant's Petitions and Motions

The record will show that Count 1 of the Petition to Vacate (grounded in 9 U.S.C. Sec. 10d) alleges manifest disregard of the law by the panel, to wit: "The panel knew of such regulations and disclosure requirements yet totally disregarded the proper application of the law. The panel did not commit a mere error of law in making their decision".

Appellant Urged Court of Appeals To Recognize Doctrine of Manifest Disregard

Further, the entire thrust of Appellant's brief to the Court of Appeals (27 pages) was directed to the proof that the arbitrators had manifestly disregarded the law and that the Court of Appeals was remiss in not following the Supreme Court in this most fundamental of legal doctrines. Appellant cajoled, entreated, begged, implored and pleaded with the Court of Appeals to recognize the doctrine of manifest disregard.

Why Respondent Had To Misrepresent Appellant's Allegation of Manifest Disregard

Obviously, if the petition claimed knowing disregard of the law - which it did - Respondent would have to concede that the Court of Appeals should have granted Appellant a trial given its new-found recognition of manifest disregard as a valid basis for vacating arbitrators' awards. Respondent, therefore, had to concoct for this Court the falsehood that Appellant had not alleged manifest disregard of the law because he fears that, in the light of *Upshur*, this Court may rule that Appellant was unfairly denied right to reinstate suit in federal court.

Further, in the motion in opposition to Respondent's 12 (b) (6) motion Appellant presented evidence that the arbitrators understood the applicable law, read and suppressed discussion of the only precedent governing the principal issue in the case (*Manevich*) and had correctly stated the applicable law. (*See* Record)

Who Is Misleading This Court ?
First Clue: No Mention of Manevich

Nowhere in the entire record will the Court find any mention by Respondent of *Manevich*, the precedent governing the SMA. He will not let the word *Manevich* pass his lips. Neither would the arbitrators or the district judge. Why this collective suppression of *Manevich* ? Because merely to acknowledge the existence of *Manevich* is to reveal that one has read the *Manevich* court's definition of the SMA ("like a bank account") which gives the lie to Respondent's perjured distortion of the SMA as "a line of credit". *Manevich* is the critical proof that the two-lawyer

majority on the panel understood the applicable law. See *Manevich*, Petition for Writ, P. 33.

Second Clue: No Mention of 12 CFR 220.6

Like *Manevich*, nowhere in the entire record will this Court find any reference by Respondent to 12 CFR 220.6 the regulation governing the SMA. Not a single word. Not even in his Brief in Opposition in this Court. To acknowledge to the courts that he knows the regulation is to acknowledge that he above all brokers understands it. He dares not risk depth of discussion of 220.6 for fear that some judge might ask whether or not he does indeed send SMA checks to the wary among his margin customers. Let Sisti argue 220.6. Respondent then need only enter general denials, as in: "Merrill Lynch takes the position that no law was disregarded". *See* Exh. 1, P. 14, below.

The Big Lie About The Big Lie

On page 7 of the Brief in Opposition, Respondent asserts that "Sisti's Petition Is Replete With Factual Errors" citing Appellant's charge that Respondent's margin specialist had "lied under oath for more than two hours".

That Respondent's Margin Specialist did so perjure himself for more than two hours is fully supported by the record. 6 of the 170 pages of this false swearing is in the record now (*Motion In Opposition to Respondent's Motion In Opposition Pursuant to 12 (b) (6) - R)*. The witness was joined in this fraud by the corporate representative, Respondent's counsel and, at key points, by the industry representative on the panel. The witness's depiction of the Special Memorandum Account (the "SMA") as "a line of

credit" (both in documentary and testimonial evidence) was not a harmless metaphor. It is exactly how Respondent treats the entire SMA: as a line of credit which allows him to lend 100% of the cost of all purchases in a contemptible "interest scam". The line of credit scam also permits him to pocket the credits in the SMA when the account is closed.

The Matter of The Transcript

Respondent has always had a complete set of audiotapes of the arbitral hearings. Counsel (two) who prepared Appellant's petition to vacate said nothing about submission of a complete transcript of the audiotapes with the petition. Appellant was told to "use what you need". Discussion at the pre-trial conference centered on whether or not a partial or complete transcript would be necessary for the trial, given its voluminous size. The district judge merely encouraged Appellant to prepare a complete transcript for the trial, which he did.

The Court's Ruling In McMahon

On Page 6, at II, Respondent boldly headlines the proposition that "whether arbitration awards may be vacated for manifest disregard of the law is irrelevant to the disposition of this case".

What he thinks is relevant is application of the doctrine of legal error. *See* his impassioned pleading for the doctrine of legal error (Pp.6-7, Respondent's Brief In Opposition), to wit:

"... the legal authority is monolithic and overwhelming that mere legal error by an arbitration panel does not state a basis for vacation of an arbitration award".

Based on the precedents he cites, the monolith appears to include every court but this one.

Respondent is apparently unaware of the Court's ruling in *McMahon*, where Justice O'Connor wrote:

"Finally, we have indicated that there is no reason to assume at the outset that arbitrators will not follow the law; although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute. *See* id (*Mitsubishi*) at 636-637 and at n. 19 (declining to assume that arbitration will not be resolved in accordance with statutory law, but reserving consideration of the 'effect of an arbitral tribunal's failure to take cognizance of the statutory cause of action on the claimant's capacity to reinstate suit in federal court')".

That is precisely what happened in this case. In what is clearly a statutory cause of action, Appellant was barred from reinstating suit in federal court because the arbitrators failed to resolve the issues in accordance with statutory law. The district judge then ruled that even if true the failure amounted to legal error. The Court of Appeals affirmed.

Mitsubishi, McMahon, Rodriguez Establish A Uniform Standard of Manifest Disregard

If *Rodriguez* was a reversal *in toti* of *Wilko* then the doctrine of manifest disregard may well be obsolete. But if *Rodriguez* is taken with *Mitsubishi* and *McMahon* to be a cohesive body of law, then the doctrine of manifest disregard is not obsolete; for in *Mitsubishi / McMahon* the

Court established a uniform standard for manifest disregard which dispenses with the complex test required by the Second Circuit and also dispenses with the difficult, if not impossible test imposed by some of the other Circuits.

This uniform standard assumes that arbitrators will follow the law and that they will resolve a statutory cause of action according to the requirements of the statute. By this standard there can be no "legal error" by arbitrators in a statutory cause of action.

Conclusion

If *Mitsubishi / McMahon / Rodriguez* are a cohesive body of law then the Court's ruling in *McMahon* is the uniform test for manifest disregard: Is it a statutory cause of action and was it resolved according to the requirements of the statute?

If this be true, then Respondent's opposition is wholly without merit since it is singularly based on the belief that, in arbitration, failure by the arbitrators to resolve a statutory issue according to the requirements of the statute may still be defended as legal error.

For all of the above reasons, Appellant prays that the Court will grant his petition for writ and "say what the law is" so that we may be delivered from this cacophony of tests, standards and judgments with respect to manifest disregard and legal error in judicial review of arbitration awards. In support of his petition Appellant respectfully invokes this opinion of Chief Justice Vinson's:

"The Supreme Court has never been primarily concerned with correction of errors in lower court decisions ...The certiorari function is not simply to do justice between the parties...The purpose of the establishment of one Supreme National Tribunal was, in the words of Chief Justice John Rutledge 'to secure the national rights and the uniformity of judgments'. That is our mission". (Quoted from *The Supreme Court: Views From the Inside*, Alan F. Westin, Ed. P. 48)

Respectfully submitted,

Sebastian C. Sisti

Exhibit 1

From the Transcript of the Motion to Dismiss
Argued April 17, 1991 in The United States District
Court for the Eastern District of Virginia,
Hon. Robert R. Merhige, Jr., Presiding Judge
Gilbert Halasz, Court Reporter.

MR. FUHR: "Well, the first basis Mr. Sisti states under the statutory provision is disregard of the law by the arbitration panel. It is established law, however, that disregard of the law by an arbitration panel is not a basis for a court vacating an arbitration award. Merrill Lynch takes the position that there was no disregard of any law.

"Mr. Sisti's sole basis for saying that the law was disregarded is that the arbitration panel did not hand down the award he seeks. He admits in his pleadings that the arbitrators were knowledgeable about the law; two of the three were attorneys, one of them a specialist in securities law, at that, and he states given that they were knowledgeable about the law and did not return an award for him, that constitutes a disregard of the law.

"That does not constitute a disregard of the law. That would create a de novo review of every claim of an arbitration award. Most importantly of all, though, is that disregard of the law by an arbitration panel, even if proven, is not a basis for this court to vacate an award".

•••

MR. SISTI: ...The arbitrators correctly stated the law. In my motion in opposition I submitted two pieces of evidence, and there are more, two pieces of evidence indicating that the arbitrators certainly knew the law".

•••

THE COURT: "Have you read Miller out of the Fourth Circuit ? Miller versus Prudential Bache ?"

MR. SISTI: "Yes, I have. Yes, I have, Your Honor. If I could find my notes on Miller."

THE COURT: "Well, what it simply says is that the court cannot vacate arbitration awards on the ground that the panel has committed errors of law".

MR SISTI: "These were not errors of law, they were not errors of law, not misinterpretation of law. It was clear, wilful disregard of the law. They understood the law. They chose to disregard it. Chose not to apply it. 220.6 is as clear as a bell. Manevich is as clear as a bell. 220.4 is as clear as a bell."

•••

MR. FUHR: "I will answer any questions about anything that was raised if you have any questions. I think we have already made clear disregard of the law is not the basis under Fourth Circuit law for setting aside an arbitration award".